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IN THE

**Supreme Court of the United States**

NOVEMBER TERM, 1938

No. **453**

**UNITED STATES TRUST COMPANY OF NEW YORK,**  
as Executor u/w of George H. Bunker, deceased,

*Petitioner and Appellant below,*

**VS.**

**COMMISSIONER OF INTERNAL REVENUE,**

*Respondent and Appellee below.*

**PETITION OF UNITED STATES TRUST COMPANY OF  
NEW YORK, AS EXECUTOR u/w OF GEORGE H.  
BUNKER, DECEASED, FOR WRIT OF CERTIORARI  
TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SECOND CIRCUIT, AND  
BRIEF IN SUPPORT THEREOF.**

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IN THE

**Supreme Court of the United States**

NOVEMBER TERM, 1938

UNITED STATES TRUST COMPANY OF NEW  
YORK, as Executor u/w of George H.  
Bunker, deceased,

Petitioner and Appellant below,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent and Appellee below.

No.

**PETITION OF UNITED STATES TRUST COMPANY  
OF NEW YORK, AS EXECUTOR OF GEORGE H.  
BUNKER, DECEASED, FOR WRIT OF CERTIORARI  
TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SECOND CIRCUIT.**

United States Trust Company of New York, as Executor of George H. Bunker, deceased, prays that a writ of certiorari issue to review the order entered August 10, 1938, in the United States Circuit Court of Appeals for the Second Circuit affirming the decision of the Board of Tax Appeals entered December 10, 1937, in the above entitled cause.

**Summary Statement of Matters Involved.**

The facts as stipulated and as found by the Board of Tax Appeals are as follows:

The decedent herein while serving in the U. S. Army during the World War took out a Government war risk insurance policy in the amount of \$10,000 under the provisions of the War Risk Insurance Act and amendments and sup-



plements thereto. The said policy was payable to decedent's widow at the time of his death. The Commissioner of Internal Revenue determined that, pursuant to Section 302(g) of the Revenue Act of 1926, the proceeds of this policy should be included in the gross estate of said decedent. By reason of the said inclusion of such proceeds in the gross estate, decedent's total life insurance exceeded the statutory exemption of \$40,000 by \$6,942.87. The deficiency assessment of \$944.31 as determined by the Commissioner is the tax upon the said \$6,942.87.

This determination of the Commissioner was sustained by the Board of Tax Appeals in a decision listed but not reported in 36 B. T. A. 1271, and subsequently sustained by the United States Circuit Court of Appeals for the Second Circuit in an opinion reported in 98 F. (2d) 734.

### **Reasons Relied on for Allowance of Writ.**

#### **A.**

The highest State courts of Minnesota, Ohio, Pennsylvania, West Virginia, Washington and Louisiana have held that the proceeds of war risk insurance policies are not taxable under the transfer, inheritance or estate tax laws of their respective States. These decisions are based on the ground that Congress by the passage of Section 28 of the War Risk Insurance Act, in effect June 28, 1918, as amended June 7, 1924, had made the proceeds of war risk insurance policies exempt from *all* taxation, and that, consequently, the reasoning of *Plummer v. Coler*, 178 U. S. 115, *Murdock v. Ward*, 178 U. S. 139, and *Chase National Bank v. United States*, 278 U. S. 327, upon which the Circuit Court of Appeals based its decision in the instant case, did not apply. So far as known to petitioner, the highest State court of no State has held such proceeds taxable under any State transfer, inheritance or estate tax laws. There is, therefore, in effect a clear conflict in the legal reasoning and the result reached between the decisions of the highest State courts and that of the Circuit Court of Appeals for the Second Circuit in the case at bar.

## B.

The decision of the Circuit Court of Appeals in this case is the only decision in any Federal court determining the taxability under the Federal Estate Tax Law of the proceeds of war risk insurance. The amount of money at stake in the present case is admittedly not large, but, as set forth in the annual report of the Administrator of Veteran Affairs for the fiscal year ended June 30, 1937, there were then in force 596,832 United States Government life insurance policies (converted war risk insurance policies), totaling \$2,577,982,119. It is obvious, therefore, that the instant case presents an important question of Federal law which has not been, but should be, settled by the Supreme Court of the United States.

The importance of this case to the ex-service men is shown by the fact that, pursuant to authorization by the National Commander, the American Legion duly filed a brief *amicus curiae* in the Circuit Court of Appeals for the Second Circuit when the case was before the said Court. Petitioner is informed and believes that it is the intention of the American Legion also to make application for leave to file such a brief with this Court in connection with this petition for writ of certiorari.

### Prayer for Writ.

WHEREFORE, your petitioner now prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full transcript of the record and of the proceedings of said Court had in the case numbered and entitled on its docket

No. 235

UNITED STATES TRUST COMPANY OF NEW YORK,  
as Executor u/w of George H. Bunker, deceased,  
Petitioner-Appellant,  
against

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the decision therein of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as this Court may deem proper.

Dated, New York, N. Y., October 24, 1938.

WILDER GOODWIN,  
Counsel for Petitioner and Appellant,  
36 West 44th Street,  
New York, N.Y.

IN THE

# Supreme Court of the United States

NOVEMBER TERM, 1938

UNITED STATES TRUST COMPANY OF NEW  
YORK, as Executor u/w of George H.  
Bunker, deceased,

Petitioner and Appellant below,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Appellee below.

No.

## BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

### I.

#### Opinion of Courts Below.

The opinion in the United States Board of Tax Appeals is listed but not reported in 36 B. T. A. 1271.

The opinion in the Circuit Court of Appeals is reported in 98 F. (2d) 734.

### II.

#### Jurisdiction.

The order of the Circuit Court of Appeals for the Second Circuit appealed from was duly entered August 10, 1938.

Appellate jurisdiction is based upon Section 240 (a) of the Judicial Code as amended January 31, 1928, Chap. 14, Sec. 1 (45 Stat. 54); June 7, 1934, Chap. 426 (48 Stat. 926).

### III.

#### Statement of Case.

The summary statement of matters involved as set forth in the petition for writ of certiorari will suffice as a statement of the case.

### IV.

#### Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that proceeds of Government war risk insurance, payable to the widow of decedent, are properly included in the gross estate of such decedent for the purpose of fixing the Federal estate tax on the estate of such decedent.
2. In failing to determine that the taxation of war risk insurance proceeds so paid to such beneficiary violates the constitutional rights of said beneficiary under the Fifth Amendment to the Federal Constitution.
3. In sustaining the determination of the Board of Tax Appeals that a deficiency of \$944.31 exists in the Federal estate tax on the estate of said decedent as paid by the petitioner as executor of said decedent.

### V.

#### Argument.

The petitioner claims:

- I. That Congress intended by the passage of the War Risk Insurance Act to exempt the proceeds of such insurance from all taxation, including the Federal estate tax.
- II. The intent of Congress to exempt the proceeds of war risk insurance from all taxation, including the Federal estate tax, would be defeated by the inclusion of such proceeds in

the gross estate of a decedent for the purpose of determining the Federal estate tax, as such inclusion must result in the diminution of the said proceeds in the hands of the beneficiary.

III. The taxation of the proceeds of tax exempt war risk insurance violates the constitutional rights of the beneficiary of such a policy under the Fifth Amendment to the Federal Constitution.

### POINT I.

**Congress intended by the passage of the War Risk Insurance Act to exempt the proceeds of such insurance from all taxation, including the Federal estate tax.**

Section 28 of the War Risk Insurance Act, in effect June 25, 1918 (40 U. S. Stat. at Large 609), was amended June 7, 1924 (Chap. 320, Sec. 22, 43 Stat. 613, 38 U. S. C. A. 454), to read, in part, as follows:

“The compensation, insurance and maintenance and support allowance payable under Parts 2, 3, and 4 respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Parts 2, 3 or 4; *and shall be exempt from all taxation.*” (Italics ours.)

All the highest State Courts to which the question has been presented have held that the proceeds of war risk insurance are not taxable under State transfer, inheritance or estate taxes because Congress by the passage of the above-quoted Act had made the proceeds of such insurance exempt from all taxation, including the said excise taxes. The reasoning of the State cases is equally applicable to Federal estate taxation (*Estate of Harris*, 179 Minn. 450; *Tax Commissioner v. Rife*, 119 Ohio St. 83, 162 N. E. 398; *Wanzel's Estate*, 295 Pa. 419; *Watkins v. Hall*, 107 W. Va. 202; *Cross Estate*, 152 Wash. 459, 278 Pac. 414; *Succession of Geier*, 155 La. 167, 99 So. 26; notes in 55 A. L. R. 613 *et seq.*; 63 A. L. R. 394 *et seq.*).



The War Risk Insurance Act of 1917 (October 6, 1917, 40 U. S. Stat. at Large 398 *et seq.*), did not contain any provision exempting the proceeds of war risk insurance from taxation, although compensation for death or disability payable under another article of said Act was specifically given such exemption (40 U. S. Stat. at Large 405). The War Risk Insurance Act of 1918, *supra*, passed on June 25, 1918, did make the proceeds of war risk insurance exempt from all taxation. It is significant that, following a message of President Wilson on May 27, 1918, urging the necessity for the enactment of a new revenue bill, public hearings were begun on June 6, 1918, by the Ways and Means Committee of the House of Representatives on the Revenue Act of 1918, which was the first revenue act to include the proceeds of life insurance payable to a named beneficiary in gross estate for the purpose of computing the estate tax. It is reasonable, therefore, to suppose the granting of tax exemption to the proceeds of war risk insurance by the War Risk Insurance Act of 1918 was due to the impending inclusion by the Revenue Act of 1918, for the first time, of such insurance proceeds in gross estate.

The Circuit Court of Appeals bases its decision in the instant case primarily on *Plummer v. Coler*, 178 U. S. 115, and *Murdock v. Ward*, 178 U. S. 139, cases in which this Court upheld the taxation of Federal tax exempt bonds by transfer or succession laws, and on *Chase National Bank v. United States*, 278 U. S. 327, in which ordinary commercial life insurance was held taxable under the Federal estate tax law.

As to *Murdock v. Ward* and *Plummer v. Coler*, *supra*, Day, J., in a case which gives a good example of the general reasoning of the State cases above cited, *Tax Commissioner v. Rife*, *supra*, 119 Ohio St. 83, at 91 *et seq.*, has this to say:

"Of course, such obligations reciting the ordinary relationship of debtor and creditor between the government and the holder thereof are like any other property of a decedent, and pass as any other assets of his estate, and are therefore rightly subject to state



inheritance tax. However, the proceeds of War Risk Insurance are a definite kind of property of a soldier's estate. \* \* \* This distinct class of property by Federal enactment is not subject to the claims of creditors, or taxation, and is solely for the benefit of the soldier and his dependents and next of kin. Such assets pass under and by virtue of the federal act, and the decision of *Plummer's Est. v. Coler, Compt.*, supra, and *Murdock's Est. v. Ward*, supra, do not relate to property of that character."

These cases can further be distinguished from the instant case in that the Government bonds held therein subject to excise tax were not exempt from the claims of creditors as are the proceeds of war risk insurance. Congress cannot have intended that this exemption should not apply to the claim of an executor of the estate which would be the case if the insurance policies are included in the gross estate. The *Chase National Bank* case, supra, is also not controlling, as it dealt only with ordinary commercial life insurance, which may be irrevocably assigned by the policyholder, while war risk insurance is specifically, by Section 28 of the War Risk Insurance Act, supra, not assignable by the holder at all. The right of the policyholder of such a policy to prevent change in its terms, e. g., as by revocation of the tax exemption therein contained, is, moreover, a property right (*Lynch v. United States*, 292 U. S. 571), which property right was entirely lacking in the *Chase National Bank* case.

Is it reasonable to suppose that Congress while specifically providing that the proceeds of war risk insurance should "be exempt from all taxation," intended such proceeds to be taxed under the Federal estate tax, particularly as the only taxes which could be imposed on the proceeds of an insurance policy are estate or inheritance taxes, excise taxes which Congress must have had in mind in granting the tax exemption?

## POINT II.

The intent of Congress to exempt the proceeds of war risk insurance from all taxation, including the Federal estate tax, would be defeated by the inclusion of such proceeds in the gross estate of a decedent for the purpose of determining the Federal estate tax, as such inclusion must result in the diminution of the said proceeds in the hands of the beneficiary.

The Circuit Court of Appeals has held in the instant case that, pursuant to Section 302 of the Revenue Act of 1926 (February 26, 1926, Chap. 27, Sec. 302, 44 Stat. 70), the proceeds of war risk insurance are to be included in the gross estate of a decedent for the purpose of determining the Federal estate tax.

Under Section 315(b) of the Revenue Act of 1926 as amended [February 26, 1926, Chap. 27, Sec. 315(b), 44 Stat. 80; June 6, 1932, Chap. 209, Sec. 803(c), 47 Stat. 280; 26 U. S. C. A. 427(b)], the transferee of any insurance policy included in the gross estate is personally liable up to the full amount of the policy for any unpaid estate taxes, irrespective of the proportion the proceeds of such policy may bear to the total taxable estate. The tax is a lien for ten years on any insurance included in the gross estate [February 26, 1926, Chap. 27, Sec. 315(a), 44 Stat. 80; May 29, 1928, Chap. 852, Sec. 613(b), 45 Stat. 876; June 6, 1932, Chap. 209, Sec. 809, 47 Stat. 283; 26 U. S. C. A. 427(a)]. If, however, the executor pays the tax in full so that no lien any longer attaches in favor of the Government on the proceeds of such policy, the beneficiary still cannot keep the entire proceeds of the policy. Section 314(b) of the Revenue Act of 1926 [February 26, 1926, Chap. 27, Sec. 314(b), 44 Stat. 79] specifically gives the executors the right in this case to recover—and a right given an executor to recover money for the estate becomes of course a legal duty—from the beneficiary his or her proportion of the tax paid. Once the proceeds of war risk insurance are included in gross

estate, therefore, such proceeds are certain to be diminished in the hands of the beneficiary, either by suit of the Government or of the executor. It will be recalled that Section 28 of the War Risk Insurance Act specifically provides that the proceeds of such insurance are exempt from the claims of creditors. If the decision of the Circuit Court of Appeals in the instant case stands, under Section 314(b) of the Revenue Act of 1926 this provision is nullified by the right of action against such beneficiary given to the executor. Surely no such result as this was contemplated by Congress in enacting the said Section 28 of the War Risk Insurance Act.

### POINT III.

**The taxation of the proceeds of tax-exempt war risk insurance violates the constitutional rights of the beneficiary of such a policy under the Fifth Amendment to the Federal Constitution.**

As shown in Point II, *supra*, the inclusion of the proceeds of war risk insurance in gross estate of a decedent inevitably results in the diminution of such proceeds in the hands of the beneficiary. Such diminution is a clear breach by the Government of the provisions in the original contract of insurance granting exemption from all taxation. This point is well expressed by Mr. Justice Brandeis in his opinion for a unanimous court in another case involving an attempted but unsuccessful breach by the Government of its contractual obligations to the beneficiaries of war risk insurance (*Lynch v. United States*, 292 U. S. 571, at 578-579) :

"But no power to curtail the amount of the benefits which Congress contracted to pay was reserved to Congress and none could be given by any regulation promulgated by the Administrator.

The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United

States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment [citing *United States v. Central Pacific R. R. Co.*, 118 U. S. 235, and *United States v. Northern Pacific Ry. Co.*, 256 U. S. 51]. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

### CONCLUSION.

It is respectfully submitted that, for the foregoing reasons, the writ of certiorari should issue as prayed for.

Dated, New York, N. Y., the 24th day of October, 1938.

Respectfully submitted,

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New York City.

ROBERT C. FLACK,  
of Counsel.

## APPENDIX.

Revenue Act of 1918, Sec. 402(f)—40 U. S. Stat. at Large, 1098:

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over \$40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Revenue Act of 1926, Sec. 302(g)—Chap. 27, Sec. 302, 44 Stat. 70:

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, \* \* \*

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent on his own life; and to the extent of the excess over \$40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Revenue Act of 1926, Sec. 314(b)—Feb. 26, 1926, Chap. 27, 314(b), 44 Stat. 79:

(b) If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its dis-



tribution. If any part of the gross estate consists of proceeds or policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of \$40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

**Revenue Act of 1926, Sec. 315(a) (as amended)**—Feb. 26, 1926, Chap. 27, Sec. 315(a), 44 Stat. 80; May 29, 1928, Chap. 852, Sec. 613(b), 45 Stat. 876; June 6, 1932, Chap. 209, Sec. 809, 47 Stat. 283, 26 U. S. C. A. 427(a):

*Upon gross estate.* Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed.

**Revenue Act of 1926, Sec. 315(b) (as amended)**—Feb. 26, 1926, Chap. 27, Sec. 315(b), 44 Stat. 80; June 6, 1932, Chap. 209, Sec. 803(c), 47 Stat. 280:

**SECTION 315.** (b) If (1) except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the decedent makes a transfer, by trust or otherwise, of any property in contemplation of or intended to take effect in possession or enjoyment at or after his death, or makes a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property,

or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, or (2) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interests under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for an adequate and full consideration of money or money's worth.

U. S. Constitution, Fifth Amendment—U. S. C. A., Const., Part 2, pp. 483, 517;

No person shall \* \* \* be deprived of life, liberty, or property without due process of law.

War Risk Insurance Act of 1917, Sec. 311—40 U. S. Stat. at Large, 408:

That compensation under this article shall not be assignable, and shall be exempt from attachment and execution and from all taxation.

War Risk Insurance Act of 1918—June 7, 1924, Chap. 320, 43 Stat. 613, 38 U. S. C. A. 454:

*Assignability and Exempt Status of Compensation, Insurance, and Maintenance and Support Allowances.*

The compensation, insurance and maintenance and support allowance payable under Parts II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made



under Parts II, III or IV, and shall be exempt from all taxation. Such compensation, insurance and maintenance and support allowance shall be subject to any claims which the United States may have, under Parts II, III, IV and V, against the person on whose account the compensation insurance, or maintenance and support allowance is payable.

The provisions of this section shall not be construed to prohibit the assignment by any person to whom converted insurance shall be payable under Part III of this chapter of his interest in such insurance to any other member of permitted class of beneficiaries.

